Supreme Court, U.S.
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(3)

No. 99-937

IN THE

Supreme Court of the United States

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

ART HUTTINGER and DONNA HUTTINGER,

Respondents.

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

JAMES FENNERN and DELORES FENNERN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Table of Appendices	iv
Reply Brief for Petitioners	1
Conclusion	8

TABLE OF CITED AUTHORITIES

Cases:	Page
Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958)	3
DLC Management Corp. v. Town of Hyde Park, 163 F.3d 124 (2nd Cir. 1998)	3
Gallimore v. Missouri Pacific Railroad Co., 635 F.2d 1165 (5th Cir. 1981)	5
Hadjipateras v. Pacifica S.A., 290 F.2d 697 (5th Cir. 1961)	6
Harris v. Secretary, United States Department of the Army, 119 F.3d 1313 (8th Cir. 1997)	3
In re Convertible Rowing Exerciser Patent Litigation, 903 F.2d 822 (Fed. Cir. 1990)	5, 6
Kay v. Koehner, 84 F.3d 316 (9th Cir. 1996)	5
Nesbitt v. Pepsico, Inc., 994 F.2d 703 (9th Cir. 1993)	2
Nidds v. Schindler Elevator Corp., 113 F.3d 912 (9th Cir. 1997)	2
Reeves v. Sanderson Plumbing Products, Inc., No. 99-536	1, 2

Cited Authorities

	Page
St. Mary's Honor Center v. Hicks 509 U.S. 502 (1993)	1, 2
Sulmeyer v. Coca Cola Company, 515 F.2d 835 (5th Cir. 1975)	3
Statute:	
28 U.S.C. § 1292(b)	4, 5
Rule:	
Fed. R. Civ. P. 42(b)	7

TABLE OF APPENDICES

Page

Appendix A — Job Description For Manager And Assistant Manager — Plaintiff's Exhibit 29 .... 1a

Appendix B — Excerpt From Ninth Circuit Docket Entries 5a

The questions in this case raise significant legal — not factual — issues. Respondents have not demonstrated how the principal issue here differs from that in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (certiorari granted, November 8, 1999). Neither have they been able to show how the court of appeals had jurisdiction to decide the interlocutory appeal in the *Fennern* case in the face of the district court's refusal to find that any issue in the case involved a controlling question of law as to which there is substantial ground for difference of opinion. If anything, Respondents' argument suggests the importance of this Court's clarifying the jurisdictional standard for interlocutory appeals. The Respondents' argument that the court of appeals correctly reversed the district court on the consolidation issue ignores that the court of appeals' principal basis for that reversal — the similarity of the reasons for the discharges in both cases — is not supported at all in the record, as Respondents tacitly admit.

1. Respondents contend that Motel 6 is asking this Court to review purely factual issues. (Resp. Br. 19). The salient facts are not in dispute, however. The issue before the Court is a legal one — whether Respondents' pretext evidence was sufficient to avoid judgment as a matter of law (JAML) or, alternatively, a new trial, where Respondents had no direct probative evidence that Motel 6 was motivated to discriminate against Respondents on the basis of age and their pretext evidence was weak. The district court acknowledged that under *St. Mary's Honor Center v. Hicks* 509 U.S. 502 (1993), Plaintiffs' prima facie case coupled with evidence from which the jury could conclude that Motel 6's reasons for the discharges were pretextual may be sufficient to defeat summary judgment or a JAML motion. (Pet. App. 62a, n.22). The district court thought, however,

that the "better view" of *St. Mary's* was that on a JAML or new trial motion a district court can still assess whether this combination gives rise to a reasonable inference of discrimination that would justify a jury verdict for the plaintiffs. (*Id.*) The issue here is thus the same as that presented in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (certiorari granted November 8, 1999). Indeed, the Respondents admit as much. (Resp. Br. 21-22).

The agreed facts in these cases are, if anything, less complex than those in *Reeves*. Respondents, Motel 6, and the court of appeals do not disagree, for example, that the Huttingers were discharged in part for discrimination against Native Americans and that there was no direct evidence of Motel 6's intent to discriminate against the Huttingers on the basis of age.[1] There is also no dispute that Motel 6 introduced documentary evidence, heavily relied upon by the district court, corroborating desk clerk Jensen's and Relief Manager Malone's testimony that the Huttingers were discriminating against Native Americans up until the time they left for vacation in 1993. (*See* Pet. 6-7). It is also undisputed that the Huttingers generally denied discriminating against Native Americans after 1990 but, like Respondents in their Opposition, offered no explanation why

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1. Respondents suggest that in the *Fennern* case there was direct evidence of Motel 6's discriminatory intent. (Resp. Br. "Questions Presented" No. 1). That evidence consisted of Massman's two passing remarks, made months before their discharge, that he could replace the Fennerns with "college students." The district court concluded that these ambiguous statements were insufficient direct evidence of Motel 6's intent to discriminate. (Pet. App. 36a). That conclusion is uniformly supported in the case law. *See, e.g., Nesbitt v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1997).

a memorandum discriminating against Native Americans bearing Jenson's handwritten name, which Donna Huttinger admitted was in Huttinger's handwriting, was found in the Huttingers' motel file. Jensen was not hired until 1993. The "factual issues" in this case are not "issues" at all. There is no dispute about the essential facts, only about their legal significance.

Respondents contend that Malone was not a disinterested witness because she wanted to relocate to Idaho and to take over management of the Huttingers' motel. (Resp. Br. 14). Malone was interested in relocating to Idaho at the time of the Huttingers' discharge, however, *not* at the time of trial, which took place much later. (Tr. 1417-18). It is not disputed that at the time of trial, Malone was employed as a school bus driver and thus had no apparent bias in favor of Motel 6 based on her employment. (Tr. 1354-55). This effort to discredit Malone and Jensen, which was shared by the court of appeals (Pet. App. 9a), is in any event highly unusual in the context of a new trial motion. The district court judge saw the witnesses and is entitled to evaluate their credibility. *See, e.g., Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 540 (1958); *Harris v. Secretary, United States Department of the Army*, 119 F.3d 1313, 1318 (8th Cir. 1997); *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2nd Cir. 1998). The scope of appellate review of the trial court's decision on a new trial motion is thus quite narrow. *Sulmeyer v. Coca Cola Company*, 515 F.2d 835, 851-52 (5th Cir. 1975).

Respondents dispute Motel 6's and the district court's (Pet. App. 56a, n.20, 33a-34a, n.4) reliance on the closeness in age of the managers in the two cases to find a relatively weak inference of age discrimination. (Resp. Br. 10-11). Like

the court of appeals (Pet. App. 11a), Respondents rely on the fact that the manager and assistant manager were hired and discharged as a team. (Resp. Br. 22). But the undisputed evidence also shows that the *responsibility* for running the motel was the manager's and that she was compensated accordingly. Thus, the official job description for manager states that the "manager is responsible for the implementation of the standards and procedures at the property . . . to ensure proper operations." (Pl. Ex. 29) (For the convenience of the Court we have reproduced the manager and assistant manager job descriptions as Appendix A to this brief). The manager is also responsible for "[s]upervision of all aspects of employment for motel staff. . . ." (*Id.*) The assistant manager "is an hourly employee who is assigned a variety of duties by the Manager, based on the daily demands of the property." (*Id.*) Among these, he must "[h]andle duties of desk clerk as needed." (*Id.*)

2. Respondents' state that Motel 6 "failed to raise . . . [the] jurisdictional issue before the Ninth Circuit panel." (Resp. Br. 26). In fact, on June 5, 1998, prior to the time the Fennerns' 28 U.S.C. § 1292(b) petition was heard by the Ninth Circuit's motions panel, Motel 6 timely filed an 18-page brief in opposition, raising the same jurisdictional issues presented to this Court. (For the convenience of the Court, we attach to this brief excerpts from the Ninth Circuit's docket sheet as Appendix B).[2]

Respondents contend that, even though the district court specifically found that an interlocutory appeal of any individual question of law was "unwarranted" (Pet. App.

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2. Judge Reinhardt sat on both the motions panel and the merits panel. (Pet. App. 2a, 15a).

25a), the district court really found that the "pretext plus" issue presented a controlling question because it certified the case on the basis that review now could shorten the time, effort, and expense of litigating the case. (Resp. Br. 24-25).

For three reasons, Respondents are wrong. First, the district court's certification had nothing to do with the "pretext plus" issue. It was concerned that the question whether Motel 6 acted willfully would not be submitted to the jury at a second trial, but that the court of appeals might later reverse the district court on that issue, requiring a third trial. (Pet. App. 24a-25a). Second, the statute speaks in the disjunctive. It requires the district court to find that there is a controlling question of law as to which there is substantial ground for difference of opinion *and* separately to find that an immediate appeal may "materially advance the ultimate termination of the litigation." (28 U.S.C. § 1292(b)). To import satisfaction of the "materially advance" requirement into the "controlling question" requirement would make the controlling question requirement superfluous in those cases where the "materially advance" requirement was satisfied. Congress indicated no such disposition to do so.

Third, Respondents' cases are of no help in this new trial case. In *Kay v. Koehner*, 84 F.3d 316, 319 (9th Cir. 1996) the district court had specifically found that the case involved a controlling question of law and the court of appeals agreed that where the issue is whether the district court has power to decide the case that is a controlling question. Plainly that is not our case. In *Gallimore v. Missouri Pacific Railroad Co.*, 635 F.2d 1165, 1168-69, n.4 (5th Cir. 1981), the court of appeals assumed jurisdiction was proper; there was no dispute concerning what was a controlling question of law. The same is true of *In re Convertible Rowing Exerciser*

Patent Litigation, 903 F.2d 822 (Fed. Cir. 1990) and of *Hadjipateras v. Pacifica S.A.*, 290 F.2d 697 (5th Cir. 1961). If, in fact, Respondents are right that some courts are using a favorable finding on the "materially advance" requirement to satisfy the "controlling question" requirement, that simply serves to demonstrate that there is a split in the circuits which this Court should resolve. (*See* Pet. 20-21, citing cases from the Seventh and Eighth Circuits.)

Finally, Respondents' "water over the dam" argument that the Ninth Circuit has already heard the cases (Resp. Br. 26) misses the critical jurisdictional point: If the Ninth Circuit never had jurisdiction to hear the case in the first place, the fact that it decided the case is irrelevant.

3. Respondents allege that Motel 6 decided not to move for separate trials when Plaintiffs announced that they would not attempt to show a pattern and practice of age discrimination through statistical evidence because Motel 6 made a tactical decision to try the cases together. (Resp. Br. 28, n.2). Motel 6 did not at any time choose to try the cases together. In fact, Motel 6 opposed consolidation of the cases at the time Respondents moved for consolidation. (C.R. 55). It did not move for separate trials again just prior to trial simply because it could not have foreseen that Respondents' withdrawal of their statistical evidence case just before the trial started would still allow Respondents to mislead the jury by arguing a pattern of age discrimination based just on the two cases, without Motel 6's having the opportunity for rebuttal grounded on its statistical evidence.[3]

3. Respondents state that Motel 6 "voluntarily" withdrew its statistical evidence. (Resp. Br. 19). The following exchange between the district court and Motel 6 counsel, however, indicates clearly (Cont'd)

In any event, a motion for separate trials is not, as Respondents suggest, a requirement for granting separate trials. Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, "[t]he court, in furtherance of convenience or to avoid prejudice, . . . may order a separate trial . . ." Fed. R. Civ. P. 42(b). Thus, although Motel 6 opposed consolidation it was not required to do so. The district court could have acted on its own motion.

Respondents acknowledge but attempt to downplay the lack of similarity of the reasons given for the discharges of the Huttingers and Fennerns — the "district court mistakenly fixed upon this distinction. . . ." (Resp. Br. 27). The problem with Respondents' analysis is that court of appeals also "fixed" on the reasons for the discharge, mistakenly finding that they were "similar." (Pet. App. 63a). That erroneous finding was critical to the court of appeals' reversal of the district court. (*See* Pet. App. 11a).

(Cont'd)

that Motel 6 did not voluntarily withdraw this evidence; it merely stated its understanding that the court was going to exclude this evidence. The district court then proceeded to do exactly that:

MR. BARNES [Counsel for Motel 6]: If I understand how the evidence is going to play, this may eliminate the whole — all the statistical evidence.

THE COURT: Frankly, it would be my intention, I'm certainly not going to allow you to rebut statistical evidence that is not being offered. (Tr. 52).

CONCLUSION

For the foregoing reasons, and those presented in the Petition, the Court should grant Motel 6's petition for certiorari in these cases and reverse the court of appeals rulings on the issues presented here.

Respectfully submitted,

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APPENDIX

APPENDIX A — JOB DESCRIPTION FOR MANAGER AND ASSISTANT MANAGER — PLAINTIFF'S EXHIBIT 29

JOB DESCRIPTION

MANAGER

The manager is responsible for the implementation of the standards and procedures at the property as established by Motel 6 to ensure proper operations of the motel.

The following is a list of essential job functions. However, the manager may be required to perform other duties and responsibilities as required by the job and Management.

ESSENTIAL JOB DUTIES

1. Supervision of all aspects of employment for motel staff, to include all aspects of hiring, training, supervising, scheduling, employee relations, and termination of all employees.

2. Responsible for ensuring that the safety and security program is maintained and complied with in accordance with company Safety & Security Manual.

3. Ensuring positive guest relations, which may involve handling inquiries regarding motel and local amenities, as well as assisting guests with problems pertaining to their stay at the property.

4. Maintain property books, including daily bookkeeping and bank deposits.

5. May be required to perform duties of desk clerk, headhousekeeper, maintenance, or other supervisory staff as needed due to special circumstances and as requested by Management.

PHYSICAL REQUIREMENTS

The following requirements may change depending on the individual property and according to the confines of the work space available for any required task.

1. As the manager must perform any of the duties from the various property positions in some circumstances, they should meet the same physical requirements noted for those positions.
2. Stand, walk, or sit alternately depending on specific daily demands. Estimate 50% of the time is spent on feet and 50% sitting at desk.
3. Firm and simple grasping are required when performing most duties.
4. Have need (up to 50% of the time) to perform the following physical activities: bend/stoop/squat; crawl; climb stairs/ladders; kneel; push or pull; twist torso; reach above shoulder level.
5. Lifting and carrying requires handling of bulk supplies weighing up to 90 pounds. Typically, the maximum weight carried is 50 pounds on an average of twice daily for distances up to 40 feet.
6. Operation of automobile.
7. Can include any duties in all other motel job descriptions on a temporary basis as needed to ensure proper operations of motel, so any physical requirements noted on those descriptions must be met for the manager position.

Appendix A

JOB DESCRIPTION

Assistant Manager

The Assistant manager is an hourly employee who is assigned a variety of duties by the Manager, based on the daily demands of the property.

The following is a list of essential job functions. However, employees may be required to perform other duties and responsibilities as required by the job or requested by management.

ESSENTIAL JOB DUTIES

1. Assist with guest inquiries and problems pertaining to the guests' stay at the motel, in order to ensure positive guest relations.
2. Responsible for ensuring that safety and security program is maintained and complied with in accordance with Company Safety & Security Manual.
3. Assist manager with maintenance of property books, including daily bookkeeping and bank deposits.
4. Handle duties of desk clerk as needed.
5. May handle any duties from all other motel job descriptions as needed or at the direction of Manager, in order to maintain proper operation of motel.

PHYSICAL REQUIREMENTS

The following requirements may change depending on the individual property and according to the confines of the work space available for any required task.

Appendix A

1. As the assistant manager must perform any of the duties from the various property positions according to the daily demands, they should meet the same physical requirements noted for those positions.

2. Firm and simple grasping are required when performing most duties.

3. Stand, walk or sit alternately depending on specific daily demands. Estimate 50% of the time is spent on feet and 50% sitting at desk.

4. Have need (up to33% of time) to perform the following physical activities:
   a. bend/stoop/squat
   b. crawl
   c. climb stairs/ladders
   d. kneel
   e. push or pull
   f. twist torso
   g. reach above shoulder level

5. Lifting and carrying of bulk supplies weighing up to 90 pounds may occur occasionally. Typically, lifting involves a maximum weight carried of 50 pounds (e.g., shampooer, container or detergent), on an average of twice daily for distances up to 40 feet.

6. Operation of automobile.

APPENDIX B — EXCERPT FROM NINTH CIRCUIT DOCKET ENTRIES

Case: Fennern, et al v. Motel 6 Operating LP, et al
Nature of suit:
Filed On: 5/28/98
Appeal From: District of idaho (Boise)

Summary

	Lower Court Information:
District:	0976-1
Case:	CV-95-00121-BLW
Presiding Judge:	B. Lynn Winmill, District Judge
Date Order/Judgment	5/13/98
Fee Status:	Unknown

Docket

Date	Description
5/28/98	RECEIVED ON 5/26/98 ORIGINAL AND 4 PETITIONS TO APPEAL PURSUANT TO RULE 1292(b); served on 5/22/98 (MOATT) (vt)
6/5/98	Filed Appellee's answer in opposition to petition for permission to appeal; served 5/22/98. (MoAtt) [98-80387] (dl)
6/10/98	Order filed The petition for permission to appeal pursuant to 28 U.S.C. 1292(b) is granted. Within 10 days of this order, petr shall perfect the appeal pursuant to FRAP 5(d) (Procedurally Terminated After

Appendix B

Other Judicial Action; GRANTED Stephen R. REINHARDT, author; David R. THOMPSON.) (fax parties 11:15 am) (vt)